No. 2769

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE PORT OF PORTLAND, a municipal corporation
RESPONDENT AND APPELLANT

vs.

WILHELM WILHELMSEN
LIBELANT AND APPELLEE

and **KNOHR & BURCHARD, Nfl.**
CLAIMANT OF THE THIELBEK AND APPELLEE

THE PORT OF PORTLAND, a municipal corporation
RESPONDENT

and **WILHELM WILHELMSEN**
CLAIMANT OF THE STEAMER THODE FAGELUND
APPELLANTS

vs.

KNOHR AND BURCHARD, Nfl.
LIBELANT AND APPELLEE

Brief for Appellee, Knohr and Burchard, Nfl.

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and KNOHR & BURCHARD, Nfl.,
Claimant of the Thielbek and Appellee.

THE PORT OF PORTLAND,
A Municipal Corporation,
Respondent,
and WILHELM WILHELMSEN,
Claimant of the Steamer "Thode Fagelund,"
Appellants
vs.
KNOHR & BURCHARD, Nfl.,
Libelant and Appellee.

Brief for Appellee Knohr & Burchard, Nfl.

STATEMENT

The statement of facts in the brief of appellant, The Port of Portland, is substantially correct. This appellee, however, does not agree with the statement on page 6 of the brief that "The running lights of the 'Thielbek'

and 'Ocklahama' were in view of those on the 'Thode Fagelund' until immediately prior to the collision, when the red lights were shut out," etc. If this means that the green light of the "Thielbek" was in view from the first, then we contradict the statement, as it is our contention that it was at first shut out, and did not appear until later.

There are some other criticisms that we might make on the statement, but, if necessary, think that we can do so just as well in the argument. We desire to call attention to the fact that the "Thielbek" was lashed to the side of the "Ocklahama," and took no part whatever in the navigation of the two vessels. The "Thielbek" kept her helm amidships, in obedience to the orders from the "Ocklahama," and the entire control and command of both vessels was exercised by the "Ocklahama." The tug and tow were operated from the pilot house of the "Ocklahama." Thus, whatever side was liable—the "Thode Fagelund" or the "Ocklahama"—the "Thielbek" was not to blame.

Knohr & Burchard's libel is set forth on pages 152-174 of the Apostles, and sets forth their theory of the collision. The theory was that the Thode Fagelund or the Ocklahama or both were to blame, but that in any event the Thielbek could not be to blame, for she was a mere tow, not participating in the navigation, and that her owners could recover from the Thode Fagelund or the Port of Portland, or both. The trial court found the Thode Fagelund alone to blame and in that finding we acquiesce. Indeed, we contended for it at the trial, and contend for it now. But in doing so we do not relinquish

any of our rights against the Port of Portland, as owners of the Ocklahama, if it should appear to your Honors that the Ocklahama was to blame.

Finally, it should be noted that none of the parties to this appeal contend that the Thielbek was in any way to blame. Whatever allegations Wilhelmsen's libel made against her, as an individual ship distinct from her tow, have now been abandoned.

ARGUMENT

WILHELMSEN CANNOT QUESTION ON THIS APPEAL THE DECREE IN CAUSE NO. 6111 DISMISSING HIS LIBEL AS TO THE THIELBEK AND AWARDING THE THIELBEK HER COSTS.

These causes were, in the court below, consolidated for trial, but not for the purpose of rendering one decree. They were kept separate throughout, and only consolidated for the convenience of having the same testimony and arguments answer for both cases. The cases were in every other respect separate and distinct and separate decrees were therefore made in each case. The first case to reach a final decree was the one numbered 6116, in the lower court, and entitled Knohr & Burchard, Nfl, Libellant, vs. The Thode Fagelund, etc., Wilhelm Wilhelmsen, Claimant, and The Port of Portland, respondent in personam. This decree is on pages 246-248 of the Apostles, and decreed that Knohr & Burchard, Nfl. recover from the Thode Fagelund and the Port of Portland damages in the sum of $12,805.26, with interest, and $239.49 costs, and allowed the Thode Fagelund to recover over

from the Port of Portland any amount she might have to pay to Knohr & Burchard under this decree. This decree was entered June 24, 1915. From this decree both Wilhelm Wilhelmsen, owner of the Thode Fagelund, and the Port of Portland have appealed.

The other case was numbered in the court below 6111, and was entitled Wilhelm Wilhelmsen, Libellant, vs. The Bark Thielbek, Knohr & Burchard, Nfl. owners, and The Port of Portland, respondent in personam. In this case Judge Bean exonerated the Thielbek, but awarded Wilhelmsen his damages against the Port of Portland on account of the negligence of Pilot Nolan. At the time Knohr & Burchard's decree in cause 6116 was entered, Wilhelmsen had not yet proved his damages, so no decree was entered in the Wilhelmsen case. When Wilhelmsen proved his damages, his proctor prepared and the court made a decree which gave him those damages, and will be found on pages 125-127 of the Apostles. This decree was entered October 25, 1915. From it the Port of Portland has appealed. This decree gave to Wilhelmsen his damages, but did not dismiss Wilhelmsen's libel against the Thielbek, nor award the Thielbek her costs, which were considerable. This decree adjudicated *one* of the issues in the case—that between Wilhelmsen and the Port of Portland—but left unadjudicated another issue quite as important, namely, that between Wilhelmsen and the Thielbek. The decree was in effect interlocutory, since it did not make a final disposition of all the issues in the case, which is a requisite to a final decree. (Benedict's Admiralty, 4th Ed., Sec. 466 and Sec. 568.)

Parenthetically we may say that this decree was prepared by the proctor for Wilhelmsen, who was naturally mainly interested in getting his damages, and the omission to dismiss the libel as to the Thielbek and award her costs was undoubtedly an oversight, both on the part of the proctor and the judge. The decree was prepared and entered during an absence from Portland of the writer, proctor for the Thielbek. When he returned, Judge Bean was away. As soon as Judge Bean returned, the Thielbek's proctor called the omission to his attention and he then made a further decree which dismissed Wilhelmsen's libel against the Thielbek and awarded the Thielbek costs in the sum of $2247.93. This decree was entered January 3, 1916, and is on pages 136-137 of the Apostles. *From this decree no appeal has been taken and it must stand intact.* It is the final decree between Wilhelmsen and the Thielbek in cause No. 6111, and until an appeal is taken from it and errors assigned, it cannot be questioned in this court. Your Honors must not mistake the assignments of error on pages 281-284 of the Apostles as referring to this decree. Those are additional assignments of error on Wilhelmsen's appeal from Knohr & Burchard's *decree of June 24, 1915, in the other cause No. 6116,* and are especially entitled in that cause and stated to be in support of Wilhelmsen's "petition and notice of appeal, and in the prosecution of his said appeal in the above entitled cause *from the decree of the 24th of June, 1915.*" We point this out because some reference is made in these assignments to the decree in case No. 6111. Just what the purpose of these references is we do not know. But it is obvious

that these assignments, expressly stated to be in pursuance of Wilhelmsen's appeal from the decree in the other case, cannot be treated as assignments of error in the decree in cause No. 6111. Indeed, it is superfluous to argue this point, for our position is clinched by the fact that no appeal of any kind has been taken from the final decree in cause No. 6111 dismissing Wilhelmsen's libel against the Thielbek and awarding the Thielbek costs. Obviously, then, that decree cannot be here called in question.

In passing we may say that the 37th of Wilhelmsen's additional assignments of error is to us without meaning. It says "That the court erred in giving a judgment, order or decree in favor of Knohr & Burchard for any amount in costs after said court had originally entered a decree in favor of the Thielbek and its owners and claimants, Knohr & Burchard, in cause 6111, from which this appellant had theretofore appealed."

Now, the court had never before entered *any* order or judgment in favor of Knohr & Burchard *in cause No. 6111,* and consequently no body could ever have appealed from it. And "appellant" Wilhelmsen has never appealed from *any* decree in that cause.

It is true that before Judge Bean made the final decree in cause 6111 dismissing the libel as to the Thielbek, and awarding her costs, The Port of Portland had appealed from the earlier decree in the same cause, which gave damages against it. We contend that this earlier decree was only interlocutory, did not settle the issues between Wilhelmsen and the Thielbek, and left one-

half the case "up in the air"; that it was the duty of the court to dispose of all the issues, and the court had jurisdiction of the cause until he did dispose of all the issues, no matter how many decrees he rendered on other parts of the case, nor how many appeals may have been taken therefrom. Why is the decree of October 25, 1915, giving Wilhelmsen his damages, any more important or final than the decree of January 3, 1916, denying Wilhelmsen his damages against the Thielbek, and awarding the Thielbek costs? One is as necessary to a determination of the case as the other. We cannot be deprived of our right to have *our part* of the case decided, merely because the Port of Portland appeals from a decree on another phase of the case. (Benedict, 4th Ed., Secs. 466, 568.)

We have written this because it may be suggested that the Port of Portland's appeal from the first decree in case 6111 deprived the lower court of jurisdiction to make his later decree in favor of the Thielbek in that cause. We think we have shown this suggestion to be unsound. If, however, your Honors should decide otherwise, then obviously the decree of October 25, 1915, in cause No. 6111 is defective, since it does not dispose of the Thielbek's case; and if your Honors should reach the same conclusion as Judge Bean on the question of liability, then your Honors, in remanding the case below, should direct that a decree be entered which shall include dismissal of Wilhelmsen's libel against the Thielbek, and an award to the Thielbek of her costs, as found by the lower court.

In speaking of the decree of October 25, 1915, as interlocutory, we are not thrusting our noses into the controversy between the Port of Portland and Wilhelmsen, as to whether or not it is interlocutory so as to render the Port's appeal therefrom premature and abortive. That is a question which does not concern us. But it certainly is interlocutory so far as the Thielbek is concerned.

AMOUNT OF THE THIELBEK'S DAMAGES IN CAUSE NO. 6116.

The decree gave the Thielbek damages in the sum of $12,805.26, with interest. Through an error in calculation, admitted by all parties, this was $69.00 too little. It has therefore been stipulated that the amount of the Thielbek's damages shall include this item, and be raised accordingly to $12,874.26, with interest until paid—this without regard to the question as to who is liable for this amount. If therefore your Honors conclude, with Judge Bean, that the Thielbek is entitled to her damages, we ask that your mandate direct that a decree be entered for the increased amount. The stipulation referred to is on page 147 of the Apostles.

ARGUMENT ON THE MERITS.

The Thode Fagelund committed four distinct acts of negligence, each of which contributed to the collision.

1. She lifted her anchor at 3:20 a. m. and started for sea at a time when she saw that the Dredge Chinook was swung directly across the channel and was blockading the northern half of it, and when she knew that by wait-

ing a few minutes until the Chinook should swing with her stern up-stream, the channel would be cleared of this obstruction and four hundred odd feet would thus be added to the room for passageway.

2. The Thode Fagelund was negligent when, approaching the Thielbek and Ocklahama on a diagonal course and having them on her starboard hand, she attempted to cross their bows, instead of obeying Rule VII of the pilot rules and blowing one whistle and directing her course to her own starboard to pass a-stern of them.

3. But when the Ocklahama had assented to the Thode Fagelund's request for a starboard to starboard passage, the Thode Fagelund was grossly negligent in not proceeding to carry out the passage agreed upon. Instead of doing so she reversed her engines and swung to her own starboard directly across the course which she had assigned to the Ocklahama and Thielbek but a few seconds before.

4. The Thode Fagelund was negligent in not blowing the three blasts required by law, to indicate she was reversing her engines.

We will discuss these acts of negligence in the order named.

THE THODE FAGELUND SHOULD HAVE WAITED UNTIL THE CHINOOK SWUNG CLEAR OF THE CHANNEL BEFORE SHE STARTED FOR SEA.

It is said at pages 48-49 of the Port of Portland's brief: "It is respectfully submitted that the true cause of the collision was the position of the Chinook in the

channel of the river. It is found by the trial court that this dredge was in such a position that vessels approaching from either side of her could not sight one another over her because of her height."

Pilot Nolan of the Thode Fagelund says that if the Chinook had not been there he would have seen the Ocklahama and Thielbek earlier (Nolan, pp. 925, 926; 929-931) and would have had more room for passage (Nolan, p. 794).

In view of this disposition to attribute the true cause of the collision to the Chinook, we ask—Why did not Nolan wait until the Chinook had swung clear of the channel before he lifted his anchor and started for sea? The Chinook was 450 feet long and was lying across a channel 1500 feet wide. In other words, the Chinook occupied a third of the channel. She was at anchor and swinging on the flood tide. A glance at the chart marked Nolan Ex. 4 (Apostles p. 1427) will show the time she occupied in swinging and that she was swinging fast, and that it would only have been a very short time until she would have tailed with her stern straight upstream and would have added 450 feet to the width of the channel. Nolan himself recognized the prudence of waiting until the Chinook had swung. His own ship was anchored only about 1000 feet above her, and he could see her plainly, and knew how she was swinging. (Nolan, p. 773). He knew she would soon swing so as to open up this channel clear. That he knew he should wait for her to swing is shown by his own testimony that he waited from 3 a. m. till 3:20 to raise his anchor, because "In the first place, the Thode Fagelund was not

headed down-stream; therefore it was necessary for me to wait until she swung with her head down the stream. *In the second place, the Chinook, laying as it was, crowded the channel, and it gave me a better opportunity to handle the vessel, and gave me more clearance to pass the dredge Chinook.*" (Nolan, p. 777). Referring to this testimony he said later: *"Said I didn't want to lift the anchor until the dredge Chinook had swung in the channel, and our ship also."* (Nolan, p. 905).

And yet, though he is thus convicted out of his own mouth of knowing that prudence demanded he should wait, he waited only half long enough. Fifteen minutes more would have swung the Chinook clear. But he did not wait, and lifting his anchor started for sea *when the Chinook was directly across the northern part of the channel.* (Nolan Ex. 4, p. 1417). This was negligence. It was the want of that care which would have suggested itself to an ordinarily prudent navigator handling a loaded ship in a harbor where up-coming vessels were to be expected.

We did not charge this specific act of negilgence in our libel and offered no proof of it. But when it became apparent from Nolan's own testimony, we asked leave to amend our libel to charge this as negligence. (Apostles pp. 972-973). The court never passed on our motion, since he found the Thode Fagelund negligent on other grounds. If your Honors should agree with us that the Thode Fagelund was negligent in this particular, then we ask that our libel may be deemed amended to conform to the proofs. (Benedict's Admiralty, 4th Ed., Sec. 413).

THE THODE FAGELUND WAS THE BURDENED VESSEL IN THE "FIFTH SITUATION" AND SHOULD NOT HAVE BLOWN TWO WHISTLES AND ATTEMPTED TO CROSS THE BOWS OF THE THIELBEK AND OCKLAHAMA. SHE SHOULD HAVE BLOWN ONE WHISTLE AND PASSED TO PORT.

In considering this question, it is of the utmost importance to get as nearly as we can the locations and courses of the respective vessels at the moment when they first saw each other. Upon their courses and locations at that instant depends Nolan's culpability or freedom from fault in blowing for a starboard passage. It is apparent that the vessels saw each other at about the same time. Nolan says that from the time he first saw the Ocklahama and Thielbek until he blew the first passing whistle was while a man would count one, two, three (Nolan, pp. 854-855) and this was corroborated by Captain Hansen, who says that the interval betwen the time he and Nolan first saw the Thielbek and Ocklahama, and the time of the first whistle, was two or three seconds (Hansen, pp. 497, 500) and that during this interval of time he walked three steps back and got his glasses and retraced his three steps (Hansen, p. 500). Pease says that he saw the Thode Fagelund "a few seconds" before she whistled, and, pressed for a more definite answer, said the interval of time might have been while a man might count ten (Pease, p. 1209). Eggars, the first officer of the Thielbek, saw the Thode Fagelund at the same time (Eggars, p. 368).

At this moment, then, when the vessels simultaneously saw each other, what were their locations and courses?

Pease says that the Ocklahama and Thielbek were 150 to 200 feet or so below the Calendar Dock and from one hundred and fifty to two hundred feet out in the stream (Pease, pp. 1126-1131) and their course, roughly speaking, was parallel with the dock line (Pease, pp. 1126-1134) and diagonal to the course of the Thode Fagelund, so that the red light of the Ocklahama showed to the Thode Fagelund, and the green light of the Thode Fagelund showed to the Ocklahama, and the Thode Fagelund's masthead range lights were quite open (Pease, pp. 1183, 1186, 1200-1202). We take Pease's location of himself at this instant as being comparatively exact, for he was close to the docks, recognized the Calendar Dock, and thus had an accurate means of fixing his position.

Nolan contradicts Pease's statement as to this course. Pease says only his red light was showing to the Thode Fagelund, which would put him on a diagonal course with the Thode Fagelund, while Nolan says that both the red and green lights of the Ocklahama and Thielbek were visible to him (Nolan, pp. 790-791) which would put these vessels on a course headed directly for the Thode Fagelund; but in this Nolan is certainly wrong. Not only do Pease and Eckhart say that their red light only would show to the Thode Fagelund and not only is Pease's course, as he has described it along the docks a probable one, and such a one as would show only his red light, but Captain Hansen and Chief Offi-

cer Hansen, *both* of the *Thode Fagelund,* agree with Pease. Captain Hansen says that at the first sight he saw two red lights on the Ocklahama and Thielbek (Hansen, p. 474) and that he saw the green light "later on." (Hansen, p. 475). His testimony is as follows:

> "Q. Now from that position which you so occupied did you at any time see any other navigating light of the Ocklahama and Thielbek than those which you have described?
>
> "A. *I saw the green one of the Thielbek later on.*
>
> "Q. At what time with respect to the collision? I mean before or after?
>
> "A. Why I guess I saw it about a minute or two before up till she struck.
>
> "Q. So then I am to understand that the only change, if any, that was noted in the position or course upon which the Thielbek and Ocklahama navigated was one which a minute or two before the collision brought into view the green light of the Thielbek?
>
> "A. Yes, sir, and the red was shut out."

The chief officer of the Thode Fagelund, J. A. Hansen, asked to tell what he saw, testified: "I saw two red lights and I sang out for them." (J. A. Hansen, p. 592). It is noteworthy that he nowhere mentions having seen a green light at this time.

Nolan himself testified that the green light of the Thielbek "opened" shortly before the collision, which makes it perfectly obvious that at the first sight it was

shut out. This testimony will be found on pages 801-802 and is as follows:

> "Q. Now had there been any change noticed by you in the course of the Thielbek up to that time?
>
> "A. Just at about the time the last danger signal was given the Thielbek's port light—the Ocklahama's port light had shut out that I couldn't see it.
>
> "Q. Then the Ocklahama's red light was closed to you?
>
> "A. Was closed to me, yes, sir, and the starboard light *opened.*
>
> "Q. Of the Ocklahama?
>
> "A. The starboard light on the Thielbek's bow, sir."

And while it is true that Nolan, on his cross examination, corrected this testimony and said it was a mistake, your Honors cannot fail to note that it agrees almost exactly with the testimony of Nolan's own captain, Captain Hansen, as already quoted.

It is also worth noting that Nolan, when marking on the chart the location of the Thielbek and Ocklahama, when he first saw them, placed them on the course we contend for; and while it is true that he later corrected this, and said that he had only intended to mark their *location,* and not their *course,* still we think the angle at which he drew the two lines representing the Ocklahama and Thielbek, when taken in connection with the other testimony, has a certain significance. See Nolan Ex. 4, p. 1417.

Pease has testified emphatically as to the course of his vessel. He was right alongside the docks and hence could judge of his course in relation to them. And when he says he was paralleling the dock line (which would necessarily show only his red light to the Thode Fagelund) we must believe him—especially when supported by all the corroborating circumstances and testimony we have noted. Pease says that the Thode Fagelund was on his port bow approaching on a diagonal course. (Pease, pp. 1201-1202).

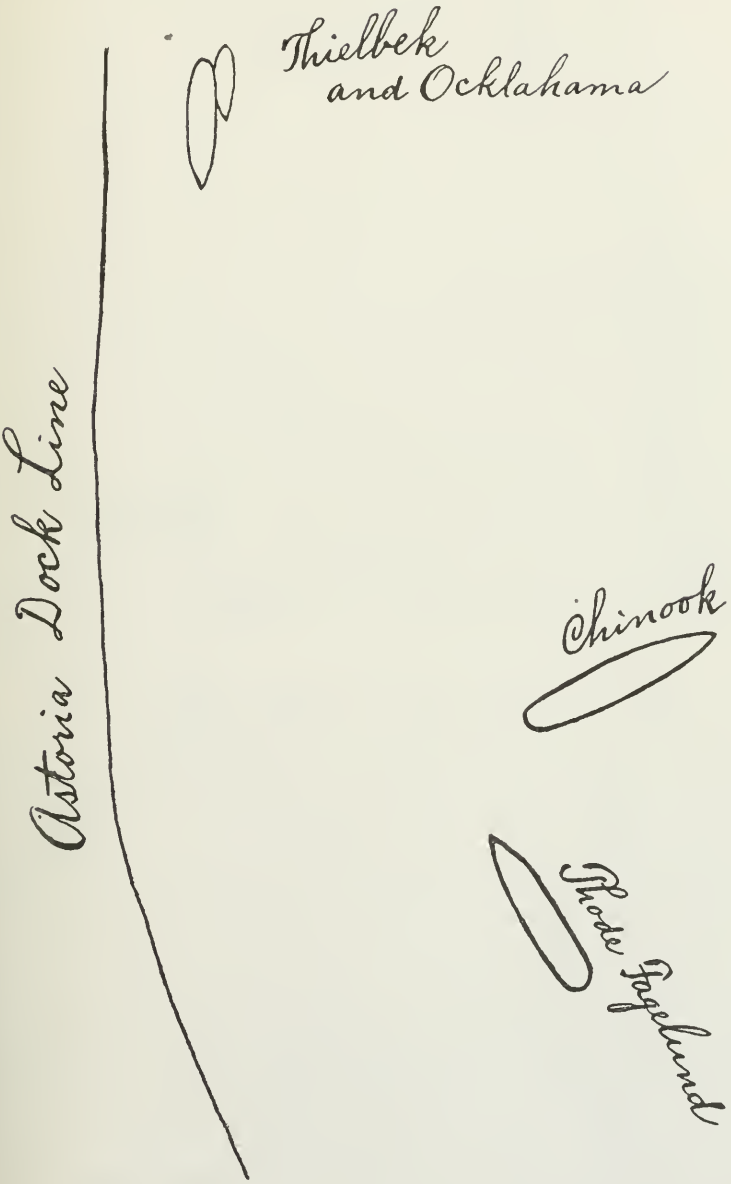
The Thode Fagelund, when she first sighted the Thielbek and Ocklahama was, according to Nolan, on a course headed to clear the stern of the Chinook by about one hundred feet (Nolan, pp. 784-785 and 853-854), and her stem was about two hundred and twenty-five to two hundred and seventy-five feet distant from the stern of the Chinook (Nolan, p. 868), and the Chinook was lying diagonally across the channel with her stern toward the Astoria docks and somewhat up-stream, (Wilhelmsen, Nolan Ex. 4, p. 1417). Captain Hansen, of the Thode Fagelund, says that his ship was at this time headed on a course to clear the stern of the Chinook by one hundred and fifty to two hundred feet (Hansen, p. 496), and was distant from the Chinook "a couple of hundred feet" (Hansen, p. 495). Nolan further says that the course of his vessel at this time was for a point one hundred feet or a little more below the Calendar Dock (Nolan, pp. 784-785 and 853-854). He is probably mistaken in this and was probably headed for some point on the docks further up-stream, for if he had been headed for a point below the Calendar Dock he would

have been headed directly for the Ocklahama, and Pease would have seen the Thode Fagelund's red and green lights and her masthead lights would have been in line, whereas Pease says that the masthead lights appeared to him "open" and he only saw the green light; and he is corboborated in this not only by those on his own vessel but by *all those on the Thode Fagelund* who *all agree* that at this time the Thode Fagelund's *green light only was visible to the Ocklahama and Thielbek* (Nolan, pp. 839, Hansen, pp. 483-484). The vessels were at this time a quarter of a mile apart according to Pease (Pease, p. 1182); twelve to fifteen hundred feet apart according to Nolan and Captain Hansen (Nolan, p. 170, and Captain Hansen, p. 470). According to the scale of the chart on which Nolan has located the positions the distance was even greater. (Wilhelmsen, Nolan Exhibit 4, p. 1417), and Nolan says that "the plat is to control in distance" over his estimates (Nolan, p.967). Captain Hansen says that the Ocklahama and Thielbek were about three-quarters of a point off the Thode Fagelund's starboard bow. (Hansen, p. 470) At another place, he says they were only half a point (Hansen, 517). Chief Officer Hansen says that they were about one-quarter of a point on the starboard bow (J. A. Hansen, p. 596). The speed of the Ocklahama and Thielbek was about six miles an hour past the land (Pease, p. 1202). The speed of the Thode Fagelund was very slow. It is alleged in Wilhelmsen's libel that the Thode Fagelund had "not yet gathered steerageway" (Apostles, p. 20). Nolan's written report, made soon after the collision, states that the Thode Fagelund "had very little more than steerage

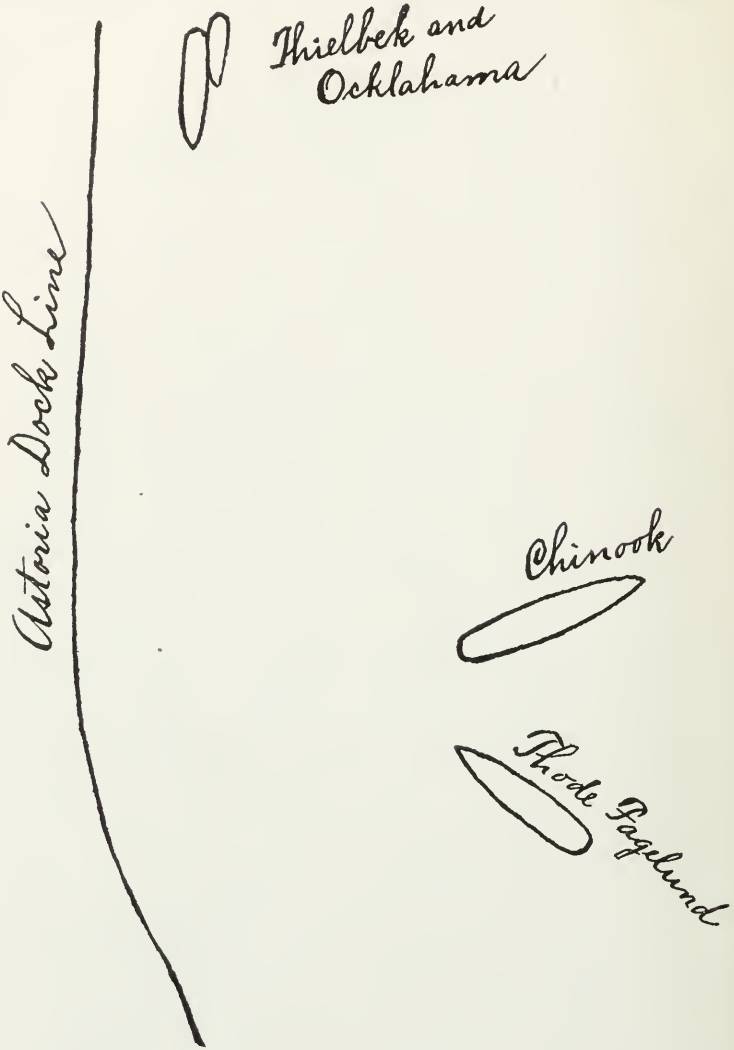
way on her" (Nolan, p. 901). Captain Hansen, in answer to a question by his counsel as to whether the Thode Fagelund had "more than mere steerageway," answered "that is all she had" (Hansen, p. 482). Nolan says that the Thode Fagelund "had just enough speed to be manageable on her helm" (Nolan, p. 796). Chief Officer Hansen, asked how far his ship traveled through the water between the answering whistle from the Ocklahama and the dropping of the Thode Fagelund's anchor, answered, "Well, hardly nothing." (J. A. Hansen, p. 612). Indeed her speed was so little that, according to Captain Hansen, she came to a "practical dead stop" before her anchor was let go, and consequently her anchor chain wouldn't run out (Hansen, p. 505); and a little later he says that before anchoring "She was stopped and was laying pretty near still." (Hansen, p. 512).

Summing up this situation, then, the ships, at the first sight, were something over a quarter of a mile apart, approaching on diagonal courses, with the Thode Fagelund as the burdened vessel and bound to keep out of the way, and the Thielbek and Ocklahama privileged to hold their course and speed. The Thode Fagelund had the Thielbek a half or three-quarters of a point on her starboard bow. The Thode Fagelund's stem was then distant from the stern of the Chinook a little over two hundred feet and she was headed on a course one or two hundred feet off the stern of the Chinook and for some point probably slightly above the Calendar Dock. Her speed was very little—barely steerageway. The Ocklahama's and Thielbek's speed was about six miles per hour. Judging from the testimony of those

on the Thode Fagelund, the positions seem to have been something like this:



or, according to those on the Ocklahama, more like this:



This situation is governed by Rule 7 of the Pilot Rules. That part of the rule which is applicable is as follows:

> "When two vessels are approaching each other at right angles or obliquely so as to involve risk of collision other than when one steam vessel is

overtaking another, the steam vessel which has the other on her own port side shall hold her course and speed; and the steam vessel which has the other on her own starboard side shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel, *or, if necessary to do so, slacken her speed or stop or reverse.*"

Nolan did not obey this rule. Instead he blew two whistles and attempted to cross the bows of the Thielbek and Ocklahama. He excuses his conduct by saying that he could not blow one whistle and go astern of them, because he was too close to the stern of the dredge Chinook and could not clear the dredge's stern and at the same time assume the responsibility of passing to the port side or astern of the Ocklahama and Thielbek. Is this excuse a good one? It is clear that it is not for the following reasons:

The Thode Fagelund's speed being as little as it was—mere steerageway—she might even, by the mere stopping of her engines, have allowed the Thielbek and Ocklahama to pass on their course. The Thode Fagelund need not have altered her course toward the dredge a particle. All she need have done was to *stop,* which was easy, for she had only steerageway. The Ocklahama and Thielbek would then have passed along close to the Astoria docks, and after they had gone by, as they had a right to do, the Thode Fagelund could have resumed her course to sea. She *might* have done this even without reversing her engines. She *certainly* could have done it by reversing her engines, as is indicated by the

fact that when she *did* reverse her engines she came, as Captain Hansen says, to a "practical dead stop" *more than a hundred feet from the dredge Chinook* (*and in no danger of collision with her*) *and nowhere near the course that the Thielbek and Ocklahama would have pursued had Nolan not blown his two whistles and attempted to cross their bows.*

In The St. Johns, *infra,* 100 feet was held ample space for passing, and many more cases could be cited to the same effect.

The rule requires the burdened vessel (which was the Thode Fagelund) to keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steam vessel, or, *if necessary to do so, slacken her speed or stop or reverse.* Why didn't Nolan do this? Why didn't he accept the position of the burdened vessel and act accordingly. He says he was afraid of the Chinook. *The very position of the Thode Fagelund at the time of the collision shows that this is not a good excuse.* At the time of the collision the Thode Fagelund, according to her own officers, was *stopped still in the water about one hundred and twenty-five or two hundred feet from the Chinook.* (Nolan's Ex. 6, p. 1419, and Captain Hansen, p. 523.) She hadn't in fact proceeded very far from where she was when she first saw the Thielbek. She came to a stop easily, and completely, yet a safe enough distance from the Chinook so as to be in not the slightest danger of collision with her. In short, she stopped and reversed and did exactly what she should have done *had she signaled for a port passage as the rule required,* and the result of what she

did—that is, the position she actually occupied after backing—shows that it would have been the easiest thing in the world for her to have occupied the same position in making the port to port passage as the rule required—in short, if she had acted as the burdened vessel. If she had done this, she would have stopped near the Chinook (*as she did*), but in no danger of colliding with the Chinook (*as she was not*), and the Ocklahama and Thielbek would have passed safely on their course over by the docks seven hundred to eight hundred feet away. "The proof the pudding is in the eating," and what the Thode Fagelund *did* do under her reversing propeller, shows what she *could* have done under a reversing propeller, had she made the port to port passage, as the rule required. And in making that passage the rule requires her to *stop, back and reverse, if necessary.* You have only to plot the vessels on the charts, *at the time of the first sight,* and *at the time of the collision,* to see that if the Thode Fagelund had blown one whistle and reversed her engines, she would not have been in the slightest danger of colliding with the Chinook, and would have let the Ocklahama and Thielbek, as the privileged vessels, go safely on their way. It was not even necessary for the Thode Fagelund to port her helm to do this. For she *never did port it,* and yet she came to a stop alongside the Chinook.

But even if it had been necessary for Nolan, in order to make a port to port passage as the rules require, to put his helm to port and direct his course to starboard, he would not have been in any danger of colliding with the Chinook, for he was at that very time almost abreast

of her, and his course gave him a clearance between him and the stern of the Chinook of between one and two hundred feet.

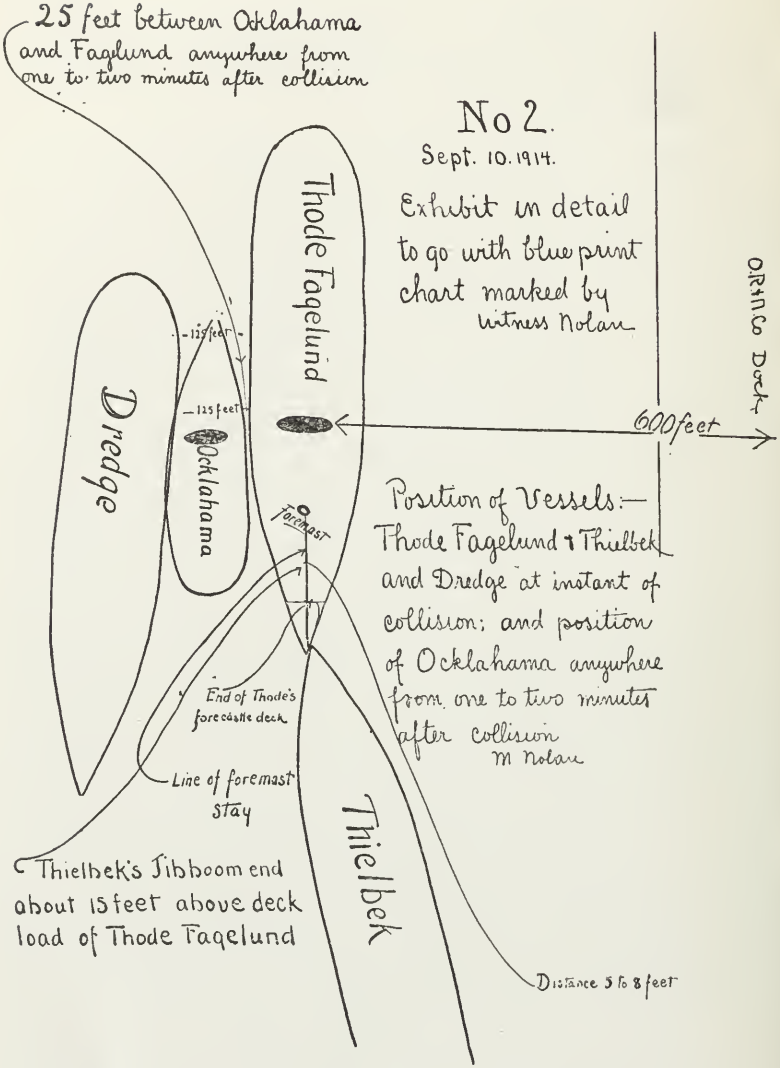
In support of this statement we point out that at the time the vessels first saw each other the "Thode Fagelund's" bow was about two hundred feet from the stern of the "Chinook," and the *course* of the vessel being from one to two hundred feet off the stern of the "Chinook," it is obvious that, even if it had been necessary for Nolan to put his helm to port at that instant, he *could not* have swung his vessel into dangerous proximity with the stern of the "Chinook" while he was going forward the short distance of two hundred odd feet. To have done so, he would have had to swing his bow to starboard nearly a foot for every foot that he went forward—and this against the tide on his starboard bow. But as a matter of fact it wouldn't even have been necessary for him to put his helm to port at that instant. He could have waited, if he had wanted to, until his bow was abreast the stern of the "Chinook" and then put his helm to port and could have easily cleared the "Thielbek" and "Ocklahama." That he could have done this easily is shown by the fact that it was only a few seconds after the *first whistle* until *Nolan was actually passing the stern of the "Chinook."* Captain Hansen shows this in his testimony on pages 500-502, where he says that the "Thode Fagelund" blew the second whistle four or five or six seconds after the first, and that at that time the *bridge* of the "Thode Fagelund" was abreast of the stern of the "Chinook." In other words, the "Thode Fagelund" was *actually passing the "Chin-*

ook" within five to ten seconds after she first sighted the "Thielbek" and "Ocklahama." It is obvious that under these circumstances she *couldn't* have collided with the stern of the "Chinook," even if she had had to put her helm hard a-port when she first sighted the "Thielbek" and "Ocklahama."

Nolan says that even if he could have got by the stern of the "Chinook" he could not have turned his boat to starboard enough to pass on the port side of the Thielbek and Ocklahama. Unfortunately for Nolan, however, we have shown that the turn which the Thode Fagelund actually *did* make under her reversing propeller shows that if he had blown one whistle and backed his engines (as the rule requires, when necessary), his boat could have passed the stern of the Chinook and passed to the port side of the Ocklahama and Thielbek very easily.

Your Honors have only to look at Nolan's Exhibit 6, p. 1419, and notice that the Thode Fagelund is practically *parallel* with the Chinook at the time of the collision, and then look at any other of the charts which show the Chinook's position in the river at this same time, and you will see that the Thode Fagelund, between the first sight and the collision, swung very sharply to her own starboard. For example, compare Nolan's Exhibit 6 with Nolan's Exhibit 7 (p. 1420). Here they are:

LIBELANT (WILHELMSEN) EX. 6
NOLAN

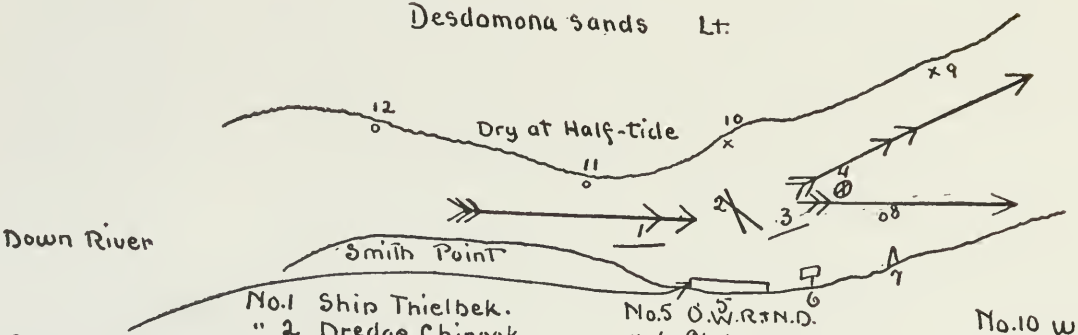


Filed Sept. 11 1914 G.H. Marsh. Clerk.

Libeller Wilhelmsen.
Nolan° Ex.7.

Libellants Ex.16
on Re-direct Examination
Cause No. 6111
A.W.P

about 2,000 feet



No.1 Ship Thielbek.
" 2 Dredge Chinook.
" 3 STF. T. Fagelund.
" 4 Where Str. Fagelund. was anchored from 9 30 PM to 3 20 A.M. Aug. 4.

No.5 O.W.R.&N.D.
" 6 Clatsop Mill Dock.
" 7 Rail Road Dock.
" 8 Gilman Ledge Cass Buoy.
" 9 Spar Buoy.

No.10 where Black Can Buoy should have been but was not in place all summer.
No.11 Black Can Buoy No.9.
" 12 " " " " 7.

Filed Sept. 11. 1914. C.H. Marsh Clerk

27.

Nolan's Exhibit 7 shows the position of the Chinook in the river at the time of the collision. The line, one end of which touches the figure 2, represents the Chinook at this time. (The line drawn across this and a little more athwart the channel represents her at the first sight.) Look at the position of the Thode Fagelund, *at the first sight,* as indicated by Nolan on this same chart, and your Honors will see that in order to get parallel with the Chinook at the time of the collision she would have to swing very sharply to starboard, and this is just what Pease says she *did* do. (Pease, p. 1194.) If she could do this by reversing her engines (and let it be noted that she did it against the influence of her helm, which was all this time hard astarboard), it needs no discussion to show that she would have had no difficulty in swinging in the same way to make a port to port passage as the rule requires. Nolan admits that the port to port passage was proper if the Ocklahama had blown first, because then, as he says, she would have assumed the responsibility for the passage. (Nolan, pp. 949-950.) This is wrong. If the Ocklahama had blown first and given one whistle, she would still have been the privileged vessel—would still have had the right to hold her course and speed and the Thode Fagelund would still have had to keep out of the way.

To sum up:

We have shown that Nolan could have *ported* his helm and passed safely without coming into dangerous proximity with the Chinook. But we go further and say that, if he was afraid of the Chinook, he did not

even need to port; his vessel having mere steerageway, he could have simply stopped his engines, or stopped and reversed, if necessary, and the Thielbek and Ocklahama would have passed way over by the docks, while Nolan waited near the Chinook, but not dangerously close to her. That he could have done this is shown by the fact that he *did* do it, and did not come in dangerous proximity with the Chinook. If then there was nothing to justify his departure from the usual rule, he is clearly at fault for having done so. When he departed from the rule he assumed the risk, and that risk was not changed, nor did his vessel cease to be the burdened vessel, nor did the "Ocklahama" and "Thielbek" lose their character of privileged vessels by the "Ocklahama's" assent to his whistles. The law on this has been stated by some of the most eminent admiralty judges in the country in the following cases:

In the "Nereus," 23 Fed. Rep. 448, Judge Brown, of the Southern District of New York, said, page 455:

> "A steamer bound to keep out of the way of another steamer by going to the right, under the inspectors' regulations, has no right, when under no stress of circumstances, but merely for her own convenience, to give the other steamer a signal of two whistles, importing that she will go to the left, unless she can do so safely by her own navigation, *without aid from the other, and without requiring the other steamer to change her course or her speed.* Otherwise she would be imposing upon the latter steamer more or less of the burden and the duty of keeping out of the way, which by statute is imposed on her-

self. When two blasts are given under such circumstances, the steamer bound to keep out of the way thereby in effect says to the other: 'I can keep out of your way by going ahead of you to the left, and will do so if you do nothing to thwart me; do you assent?' A reply of two whistles, in itself, means nothing more than an assent to this course, at the risk of the vessel proposing it. Such a reply does not of itself change or modify the statutory obligation of the former to keep out of the way as before, nor does it guaranty the success of the means she has adopted to do so. The City of Hartford, supra; The Vanderbilt, 20 Fed. Rep. 650.

"But from the moment that such an attempt apparently involves risk of collision, both steamers are equally bound to do all they can to avoid a collision; and under rule 21 they may each be bound to slacken speed, or to stop and reverse, according to the circumstances. But this general obligation under rule 21 applies equally whether the previous signals were of two whistles or of one. The precise acts which either is bound to do, when immediate danger of collision arises, must depend upon the particular circumstances, and of these circumstances the previous understanding as to the course or intention of each vessel is one of the most important. But where the circumstances are such that a course proposed by a signal of two whistles would, if assented to and adopted, require at once, as in this case, immediate and strong measures to avoid a collision, there can be no question that such a proposal is wholly unjus-

tifiable, and a gross fault, when proposed by a steamer that is bound to keep out of the way, and is under no constraint of circumstances, but free to pursue other safe methods of doing so."

See also "The Greenpoint," 31 Fed. Rep. 231, another decision by Judge Brown of the Southern District of New York.

In "The Admiral," 39 Fed. Rep. 574, Judge Benedict, of the Eastern District of New York, said:

"This is an action brought by the owners of the water-boat Croton to recover for the sinking of that boat in a collision with the lighter Admiral that occurred in the East River on the 13th day of February, 1888. The Admiral was proceeding up the East River along the piers. The Croton was crossing the river from the New York shore, bound to the slip at Prentice's Stores, on the Brooklyn side. An examination of the evidence shows the collision to have been occasioned by the fault of the Croton, and not by the fault of the Admiral. The Croton was on a course crossing the course of the Admiral, and having the Admiral on her starboard side. Although she, as she says, blew two whistles to the Admiral twice without receiving a reply, she kept on without change of course or speed, giving to the Admiral a third signal, to which the Admiral then replied by two. It is argued on behalf of the Croton that the failure of the Admiral to reply to her signal shows now that the Croton was not seen by the Admiral. If so, it showed the same thing then. The Croton, therefore, attempted to cross the bows of a

vessel near at hand, and known by her to be ignorant of her presence, and of course she assumed the risk of crossing in safety, without any action on the part of the Admiral. Again, when after the Admiral's delay to reply to two of her signals, upon receiving a reply to her third signal, she starboarded hard and opened her engine in an endeavor to cross the Admiral's bows, she took the risk upon herself, and failing is responsible for the result. The reply of the Admiral to her signal gave the Croton no immunity from the responsibility cast upon her by the law. A mistaken idea seems to be entertained in behalf of the Croton that it was a fault on the part of the Admiral to blow two whistles in reply to the two whistles of the Croton, unless it was the judgment of the Admiral that there was room and time for the Croton to pass ahead in safety. It was not for the Admiral, but for the Croton, to determine whether there was room and time for her to pass the Admiral's bows in safety. Her signal to the Admiral announced her determination of that question, and the reply of the Admiral simply informed her that her determination was known to the Admiral and constituted no fault. It is further claimed, on behalf of the Croton, that the Admiral was in fault, because, after blowing her two whistles in reply to the Croton's signal, she ported her helm, when, by starboarding, she would have assisted the Croton in her attempt to cross the Admiral's bows. The answer here is that it was no part of the duty of the Admiral to assist the Croton.

> The limit of the obligation upon the Admiral was, when danger of collision appeared to her, to adopt such measures as she had at command to avoid collision. Upon the evidence I doubt whether it was a mistake on the part of the Admiral to port when the Croton starboarded to cross her bows, but if it was a mistake it is not to be laid at the door of the Admiral as a fault. If it was a mistake, and if in the absence of that mistake the Croton would have passed in safety, the mistake is not to be attributed to the Admiral, but to the Croton, whose unwise action alone required the Admiral to determine a question that otherwise would not have been presented. The libel must be dismissed, with costs."

We do not contend that under no circumstances may the burdened vessel depart from the rule and blow two whistles and attempt to cross the bows of the privileged vessel. But we do say there are no circumstances in this case justifying such a departure. And the very position of the Thode Fagelund at the time of the collision shows that she could have made the port passage safely and without danger of collision with the dredge, and consequently was under no stress of circumstances which excused her departure from the usual rule.

The rule is statutory, and the Thode Fagelund must show, not only that her breach of it did not cause the collision, but that it could not have done so.

> The Pennsylvania, 19 Wall. 125, 136.
>
> The Martello v. The Willey, 14 Sup. Ct. Rep. 723, 727.

BUT WHEN THE THODE FAGELUND HAD BLOWN TWO WHISTLES FOR A STARBOARD TO STARBOARD PASSAGE AND HAD RECEIVED THE OCKLAHAMA'S ASSENT SHE WAS GROSSLY NEGLIGENT IN REVERSING HER ENGINES AND GOING TO HER OWN STARBOARD.

The testimony on this part of the case clearly shows that Nolan lost his head. Consider the time that elapsed between his second signal and the time he reversed his engines and thus made obedience to the signal impossible. Only about *six seconds.* A detailed statement of the signals, orders and times intervening is as follows:

Nolan sighted the Ocklahama and Thielbek and blew two whistles. About five seconds later he stopped his engines because he had received no answer (Nolan, p. 855). About five seconds after that (i. e., ten seconds after the first whistle) he again blew two blasts (Nolan, p. 858). This second whistle was promptly assented to by the Ocklahama (Nolan, pp. 858-859), and yet within *five or six seconds* after that, Nolan reversed his engines full speed astern (Nolan, pp. 859-860) and made the passage agreed on impossible. Captain Hansen makes the time even shorter. He says (p. 502):

> "If I am not wrong he reversed them *before he blowed the second whistles.*
>
> "Q. Before he blowed the second whistles?
>
> "A. No, it probably was—it was probably afterwards, *just in the same instant.*
>
> "Q. About the same time?

"A. The second two whistles, and then astern.

"Q. That is, he reversed his engines full speed astern at the time of the second whistle or immediately after the second whistle.

"A. *Immediately after,* yes."

Mr. Tollefsen, the chief engineer of the Thode Fagelund, who was on duty in the engine room, corroborates this, for he says that "very quick" after he got the stop bell he got the bell for full speed astern. When it is remembered that the stop bell *preceded* the second two whistles, it becomes apparent that the reversing bell came within a very few seconds after the second whistle. (Tollefsen, p. 655.)

This act of Nolan's — even if he were otherwise blameless—should fix the responsibility for the collision. It was absolutely necessary, in order to carry out the maneuver, that he had himself requested that he *go ahead* on a starboard helm. As Pease says, "what I wanted him to do was to *come ahead* on the starboard helm. That is what I wanted him to do." (Pease, p. 1247.)

It was absolutely necessary that Nolan do this, if he were going to make the passage across the Thielbek's bow, that he had asked for. And his two whistles, to which the Ocklahama assented, meant that he *would* do this—meant that he considered it safe to cross their bows and that he would *go ahead* on a starboard helm. Yet within six seconds—so short a time that Hansen says it was "in the same instant"—after having asked to do this, he reversed his engines full speed astern, and stopped his vessel right in the path he had himself assigned to

the Ocklahama and her tow. Nolan asked Pease by his two whistles to come over toward the Chinook, letting him (Nolan) go over toward the Astoria docks. The collision occurred right next the Chinook in the very waters Nolan had invited Pease into, and the very waters which of all others Nolan should have been out of. All this was because Nolan reversed his engines. And there was nothing *in extremis* about this. The ships were a quarter of a mile apart in clear sight of each other.

This mere *stopping* of his ship right in the way of the Ocklahama was bad enough. But even this is not all. He did more than *stop*—he swung to *starboard.* Every seaman knows, and it is in the testimony here, that a right-handed propeller, backing, swings to her own starboard. Nolan knew it—knew that the Thode had a right-handed propeller and would swing to her own starboard, if he reversed her—that is, swing right toward the Chinook and make it *impossible* for the Ocklahama to pass. That Nolan knew the Thode had a right-handed propeller and would so swing is shown by the conversation between him and Captain Hansen, reported by the latter as follows: "When Captain Nolan told me to 'back her full speed, Captain.' 'All right, sir. *She may turn on you, Pilot,'* I said. 'I know it, sir,' he said, 'but it can't be helped.' Or he said 'Maybe it can't be helped.' That is all the conversation." (Hansen, p. 520).

Hansen knew that the move was an improper one and dangerous, and, though he denies that he said anything further to Nolan, we think he said enough to show that he protested against the maneuver. That this action of Nolan's was the immediate cause of the collision

we think there can be no doubt. Pease, assenting to Nolan's request, had swung his tug and tow to their own port and was heading directly for the stern of the "Chinook" to give Nolan six or seven hundred feet of water to execute the maneuver he had himself requested, and yet within five or six seconds, or as Hansen says, "in the same instant," Nolan changed his mind, decided the maneuver was impossible, reversed his engines and swung his boat eight points (according to Pease) to her own starboard directly across the course which he himself had assigned to the "Thielbek" and "Ocklahama." He made the collision inevitable. Nolan's own statement of the position of his boat at the first sight, two hundred feet or so above the "Chinook," headed to clear the "Chinook" by a hundred feet and for a point a little below the Calendar Dock, and his position at the time of the collision, as he has himself indicated it, and the hole in the "Thode Fagelund's" *port* bow, when she had asked for a *starboard* to *starboard* passage, all show how sharp the "Thode Fagelund" swung off her course under the influence of the reversing propeller and directly across the course of the "Ocklahama" and "Thielbek."

The admitted point of the collision should fix the responsibility for it without further argument. Nolan, by his two whistles, said: "I want to go over next the Astoria Docks." Pease, by his assent, said: "All right, go ahead. I'll do nothing to thwart you." Pease was entitled to hold his course and speed until risk of collision became apparent. But he didn't insist on the right. He yielded more than was required of him and *immediately*

started over toward the Chinook—indeed headed so close to her that he was backing his own engines to keep from colliding with her (Pease, pp. 1189-1190). Nolan on the other hand went *nowhere* near the course he had assigned to himself, the Astoria Dock side, but on the contrary, with six or seven hundred feet of clear water on that side for him to pass in, swung his vessel right underneath the Chinook's stern into the only place where Pease could possibly pass, and the collision took place within about a hundred feet of the Chinook. All this happened because Nolan reversed his engines, and what reason does he give for reversing his engines? One that is no good at all. He says that he reversed them because the Ocklahama and Thielbek did not appear to change their course (Nolan, p. 836-837). Mind you, within five or six seconds, or as Captain Hansen says, "in the same instant," after the exchange of the two whistles between the two boats, Nolan reversed his engines because the "Ocklahama" and "Thielbek" did not change their course. *They didn't have to change their course.* As the privileged vessels they were *entitled to hold their course* until it became evident that there was risk of collision by their so doing, in which case of course they would have to go to port, stop, reverse and do everything on their part to avoid a collision. But until it became evident to them that there would be risk of collision if they held their course and speed, they were entitled to hold it, and we submit that they should have been given more than five or six seconds to make up their minds whether there was risk of collision before Nolan should take it upon himself to reverse his engines. Further-

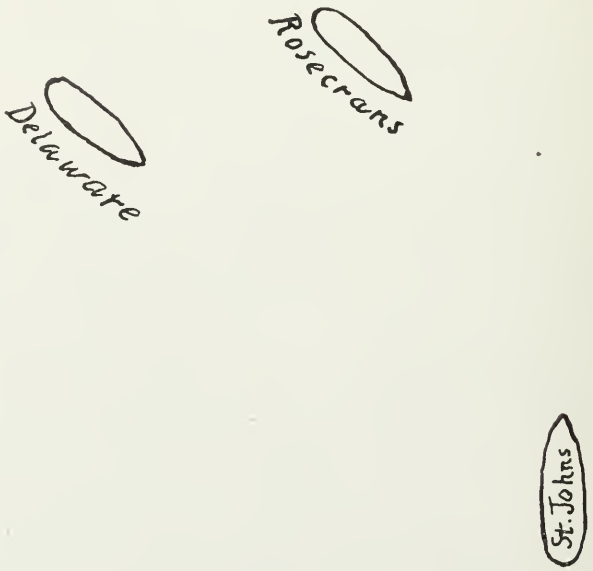
more, it *couldn't possibly* be apparent to Nolan, within that short length of time, whether the "Ocklahama" and "Thielbek" actually were changing their course or not. The "Thielbek" is a big barque three hundred feet long and though she was only in ballast and though the "Ocklahama" is a powerful tow-boat, Pease could not possibly in five or six seconds, have swung them to their own port sufficiently for Nolan to be able to tell whether they were changing their course or not. The only thing we can conclude from Nolan's statement is that he hastily jumped to the conclusion that the "Ocklahama" and "Thielbek" were not changing their course, without waiting to see whether they were or not, and he lost his head and gave the fatal order to reverse.

As a matter of actual fact, however, Pease was swinging his vessels to port *at the time of the exchange of whistles,* and as soon as he had answered the "Thode Fagelund's" whistle he swung his boats further to port as fast as he could (Pease, p. 1185). Pease's red light only was showing to Nolan at this time (in spite of Nolan's statement to the contrary) and in the five or six seconds in which Nolan concluded there was no change of course and that he would have to reverse, the green light on the Thielbek's starboard side hadn't had time to come into sight yet. That Pease *did* actually change his course, as he said he did, and *did* actually bear for the stern of the Chinook is *proved conclusively by the fact that the collision is admitted to have taken place right alongside the Chinook.*

Following are some cases holding it negligence for a vessel in the position of the Thode Fagelund to reverse her engines. They will be found directly in point.

The St. Johns, 34 Fed. 763,
Affirmed, 42 Fed. 75.

In this case the St. Johns was the privileged vessel, and the Delaware and Rosecrans, two tugs running on parallel courses, were off the St. Johns' port bow and were the burdened vessels. It was the "Fifth Situation" and the positions were something like this:



The Rosecrans blew two whistles to cross the St. Johns' bow, to which signal the St. Johns assented. The Delaware and the St. Johns had agreed that the Delaware should pass astern of the St. Johns as the rule required. The Rosecrans, instead of keeping on as she had agreed to do, reversed her engines when she and the

St. Johns were less than three hundred feet apart, and the St. Johns struck her.

In the District Court, Southern District of New York, Judge Brown held the Rosecrans at fault and said:

> "Upon the above view it is clear that the immediate cause of the collision was the fact that the Rosecranz stopped in the water instead of keeping on in accordance with the previous understanding by signals. She was the vessel bound to keep out of the way. She selected her own mode of doing so. She adhered to this choice, and repeated it, after she knew that the St. Johns was to go ahead of the Delaware. It is plain that, had she kept on, she would have cleared the St. Johns on the latter's starboard side by at least 100 feet, i. e., by as much space as the Delaware had on the St. Johns' port side, and probably more; and that without any change of the St. Johns' helm. This was sufficient space. The mode agreed on for avoiding each other was a proper one. Under this agreement, had the Rosecrans kept on, there would have been no risk of collision. The St. Johns, under such circumstances, owed no duty to the Rosecrans, except not to thwart her attempts to keep out of the way by going ahead as agreed, which the St. Johns did not do; and except that, after risk of collision appeared through the Rosecrans' fault, she was bound to do what was possible to avoid her. City of Hartford, 11 Blitchf. 72, 75; The Nereus, 23 Fed. Rep. 455, 456; The Vanderbilt, 20 Fed. Rep. 650; The Governor, 1

Abb. Adm. 108; The Greenpoint, 31 Fed. Rep. 231. Even with this stopping by the Rosecrans, she lacked but 10 or 12 feet of clearing. There was no reasonable or apparent necessity for stopping contrary to the agreement under which both had been acting. The St. Johns had a right to rely on the Rosecrans keeping on as agreed; and stopping, instead of being 'necessary,' was the maneuver that tended to bring on collision, instead of avoiding it. Rule 21 has no application in such circumstances. The Northfield, 4 Ben. 112; The Britannia, ante, 546. For stopping, the Rosecrans must therefore be held to blame."

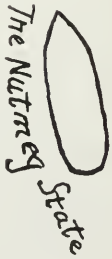
On appeal the Circuit Court affirmed this decision. Judge Lacombe's opinion is here given in full, 42 Fed. 75, 77:

"The findings, taken in connection with the opinion of the district judge, (34 Fed. Rep. 763) sufficiently indicate the grounds of affirmance. Had the navigation of both vessels been in accordance with their agreement, there would have been no collision. What, then, was the agreement, and who failed to keep to it? The Rosecrans and the Delaware being each in the "fifth situation" relatively to the St. Johns, which was on their starboard hand, were required by the rules to port, and pass astern of the St. Johns; the latter continuing on her course, and passing ahead. For some reason or other, the pilot of the Rosecrans disliked to take this course—probably because he was crossing an ebb-tide incumbered with a tow—and undertook to agree with

the St. Johns upon some other course. What thereupon occurred, as evidenced by the signals, was this: 'I want to cross your bow,' says the Rosecrans. 'I am going to cross the Delaware's bow,' is the reply; 'but if you wish to cross mine, you may.' 'I wish to do so,' responded the Rosecrans, 'and will act on your permission.' By this agreement, it became the duty of the Rosecrans to keep her course without unnecessary delay, and of the St. Johns not to thwart her, nor to intrude into the water through which the maneuver which the Rosecrans was about to undertake would in ordinary circumstances be carried out. Thereafter the St. Johns slows. She crosses the bow of the Delaware according to programme, and by as narrow a margin as she safely can. She then co-operates by starboarding. She does not intrude into the water which would have been required for the tug's maneuver, if executed as promised. She does, in fact, collide with the Rosecrans, but solely because of the latter's stopping. If what was ordinarily to be expected had happened, the water into which the St. Johns came would not have been at that time required for the maneuver the Rosecrans was making. Nor was the master of the Rosecrans justified in stopping by any fear as to the St. Johns' course. Nothing in the situation or in the latter's agreement was demanding an alteration of her course up to the time when the Rosecrans reversed. In this particular the case differs from that of The Britannia, ante, 67, which, both by the rule governing her situation, and by the promise of her signal, was required to alter her heading several points. This case is also to be distin-

guished from The Sammie, 37 Fed. Rep. 907. There the failure of the Burke to alter her navigation so as to co-operate with the Sammie was persisted in, without any apparent cause, for so long a time that the pilot of the Sammie was held excusable in reversing, contrary to his agreement, such maneuver being made in extremis. Here the St. Johns did alter her navigation to co-operate with the Rosecrans as soon as she could. It is true that by that time she was quite near the Rosecrans; but the master of the latter knew, when he made his agreement with her, that he must expect no stoppage or swinging to port from her until she had reached the Delaware's bow. Decision of the district court affirmed."

The Nutmeg State, 62 Fed. 847. This was the "Fifth Situation." The position was something like this:



The Monitor was the burdened vessel. She blew two whistles, to cross the bow of the Nutmeg State. The Nutmeg State assented. But the Monitor, instead of keeping on, slowed her engine, collision resulted, and she was held to blame.

Judge Brown delivered the following opinion:

"On the 26th of December, 1893, at about half past 2 in the afternoon, as the steamtug Monitor, with barges belonging to libelants in tow on each side of her, was coming down about the middle of the East river, in the ebb tide, she saw, when about off pier 49, the steamer Nutmeg State coming out of her slip at pier 35, on the New York side. When the latter had cleared her slip, the Monitor gave her a signal of two whistles, to which the Nutmeg State answered with two, signifying that she would go astern of the Monitor. The Pilot of the Monitor starboarded his wheel, but soon after slowed his engine, because, as he says, he did not see the Nutmeg State rounding to port as much as he expected, and he wished to have his engine in condition to back immediately, if necessary, without liability to catch on the center. Soon afterwards the Nutmeg State struck the side of the barge which was on the starboard side of the Monitor, and the shock damaged two boats on the Monitor's port side also. The above libels were filed against the Nutmeg State to recover the damages; and the Monitor was brought in as defendant upon the petition of the latter.

"I am satisfied upon the evidence that this collision was brought about by the act of the Monitor in slowing her speed, after she had given a signal of two whistles to the Nutmeg State, thereby, in effect, agreeing that she would go ahead of her. The evidence leaves no doubt that but for this slowing the Nutmeg State would have passed clear astern. The slowing of the Monitor was directly contrary to the meaning of her signal that she would go ahead. It was essentially a thwarting maneuver, which places upon her the fault for the collision. The Monitor was tardy in giving her signal; for though her pilot saw the Nutmeg State coming out before she was out of her slip, he delayed his whistle till she was well outside of it. The St. Johns, 34 Fed. 763, affirmed 42 Fed. 75; The Britannia, 34 Fed. 546, 556, affirmed 153 U. S. 130, 14 Sup. Ct. 795.

"I do not perceive that the Nutmeg State was to blame. The contrary maneuver of the Monitor in slowing was the last thing that the Nutmeg State was to expect. She had come out of her slip under a hard-a-starboard wheel, and kept it until collision. The river there being only about 1,300 feet wide, and the Monitor near the middle, there was very little space for the Nutmeg State to maneuver after she came out. She could not by reversing have stopped in time after the slowing of the Monitor was perceived; only 250 to 300 feet distant, she was already in extremis, and reversing would have brought her head to starboard and made a worse collision probable. I think under the special circum-

stances the master's judgment was correct; that his only chance of escape was to continue on with a hard-a-starboard wheel. That he did not escape was not his fault, but the Monitor's.

"The libelants are, therefore, entitled to judgment against the Monitor; and the Nutmeg State is discharged.

"Decree accordingly."

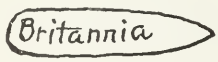
The Northfield, 4 Benedict, 112, Fed. Cas. No. 10, 326. In this case the vessels were in this situation:

The Northfield, as the burdened vessel, was going to keep out of the way by passing astern of the Hunter, and was swinging to do it. The Hunter was bound to keep her course. But when about three hundred yards distant from the Northfield, the Hunter, instead of keeping her course, stopped her engine and backed, and thus remained in the very water through which the Northfield had expected to pass.

Judge Blatchford held the Hunter solely to blame

and the case was affirmed by the Supreme Court of the United States, 14 Sup. Ct. Rep. 1184.

The Britannia and The Beaconsfield, 14 Sup. Ct. Rep. 795. This also was the "Fifth Situation. The vessels were something like this:



The Britannia was the burdened vessel, and bound to keep out of the way by going astern of the Beaconsfield. The Beaconsfield was privileged and should have held her course and speed. The facts are thus stated by the court, page 797:

> "The Beaconsfield descried the Britannia when the latter vessel came around Governor's Island, and about the time she was disengaging herself from the ground. The Beaconsfield thereupon blew a single blast of her whistle, which meant that she expected the Britannia to pass under her stern. It is

found that this whistle of the Beaconsfield was neither heard nor seen on the Britannia, but the latter's whistle, given while getting clear of the bottom, was heard on the Beaconsfield, and taken to be an answer to her own whistle. It is thus evident that the pilots of both vessels agreed in the view that the proper thing to avoid collision was for the Britannia to swing to starboard, and pass behind the Beaconsfield. It is next found that the Beaconsfield, when she blew her first whistle, put her helm to port a little, and went on at a slow speed. Her observation of the Britannia did not show that the latter was swinging to starboard, but even was disclosing a little more of her starboard side to the Beaconsfield. Thereupon the latter blew another single whistle, which still signified her expectation that the Britannia would pass astern, and, hearing no answer, put her wheel hard a-port, and stopped her engines, and reversed full speed. Her engines were kept reversed until her headway was stopped. Then her engines were stopped, and, at the time of the collision, she was nearly, if not quite, dead in the water. After her headway was thus stopped, the Beaconsfield took no further action, and lay still in the water until struck. The time for such stopping of her headway until the collision, during which she lay still, was about a minute and a half. It is further found that, if the Beaconsfield had not stopped and backed, it is probable that the Britannia would have passed a short distance astern of her; and, in-

deed, under the finding as to her rate of speed before she stopped, this is quite evident.

"Was this behavior of the Beaconsfield in stopping her headway and remaining still, without further effort, for a minute and a half, proper, or, at least, excusable, as held by the circuit court? Or was it improper, and did it put her in contributory fault, as held by the district court?"

This question the Supreme Court itself answered as follows:

"The disregard by the Beaconsfield of the Britannia's signal, her failure to obey the rule and keep her course, and her supine negligence in remaining motionless for so long a period, while she saw the Britannia approaching her, clearly put her in fault."

The William Chisholm, 153 Fed. 704. Two steamers, the Chisholm and the Oceanica, were approaching end on, or nearly so. When within fifteen hundred or two thousand feet of each other, after some preliminary whistling, they exchanged two blasts, and agreed on a starboard to starboard passage. The Oceania, however, either through a wrong helm or stopping and backing her engines, continued to swing to her own starboard contrary to the whistles she had given, and collided with the Chisholm eight hundred feet to starboard of the course on which she had been proceeding. The Oceanica was held solely to blame. Judge Severens said, in the course of his opinion, page 711:

"The darkest part of the case is the conduct of the Oceanica after the time when she gave her two-blast signal, and when she saw the Chisholm turning out abruptly on her hard astarboard wheel. There was no reason why she should not have turned to port and proceeded in accordance with her response. There was even less danger in doing that than in remaining where she was or in checking and backing, which would have a tendency to throw her stem to starboard. She gave testimony tending to show, and her counsel argues, that she nearly stopped in her course and remained almost dead on the line where she was, overcoming her progress by checking and backing, and that while she was doing this she was struck on her stem by the broadside of the Chisholm; but there were strong indications which discredit even this story, *faulty as this conduct would have been.*"

THE THODE FAGELUND WAS NEGLIGENT IN NOT BLOWING THE THREE BLASTS REQUIRED BY LAW TO INDICATE THAT SHE WAS REVERSING HER ENGINES FULL SPEED ASTERN.

The rule is embodied in Article 28 of the Act of Congress of June 7, 1897, and is as follows: "When vessels are in sight of one another, a steam vessel under way, whose engines are going at full speed astern, shall indicate that fact by three short blasts on the whistle." The Thode Fagelund did not observe this rule, and her failure to observe it contributed to the collision, because

it left Pilot Pease of the Ocklahama completely in the dark as to why the Thode Fagelund was continuing to swing to her own starboard and toward him, instead of to her own port and away from him, as her two whistle signal had indicated she would do. If Pease had received a signal of three blasts from the Thode Fagelund, when the vessels were a thousand feet apart, he would have known she was backing and would keep swinging to her starboard, and it is possible that by blowing the danger signal, followed by one blast, and directing his course to starboard, he could have allowed the Thode Fagelund to continue on her starboard swing under her reversing propeller and the vessels *might* have passed safely port to port; but as long as Pease was in the dark as to why the Thode Fagelund kept swinging to her own starboard, he obviously could not attempt to change the maneuver they had agreed on, for he expected that any instant the Thode Fagelund would stop swinging to starboard and bear off to her own port in accordance with the two whistle signal she had given.

Pease's testimony shows how inexplicable to him was the Thode Fagelund's continued swinging to starboard and that he expected her every minute to commence to swing to port as agreed, and also shows what he might have done had Nolan blown the three blasts. Pease says (pp. 1246-1247):

"A. I said that I thought his backing—

"Q. Was the cause of the collision?

"A. (Continuing) had a good deal to do with the cause of the collision, yes, sir. What I mean, at

the time of the collision, I didn't know whether he was backing or what he was doing, but this is from after we found out these things. Of course, now, although I have heard—excepting from just the testimony I have heard, is the only reason that I know he was backing. At the time of the collision, he was swinging to the his starboard. I couldn't tell why he was swinging to his starboard, when he told me in so many words he was going to his port. Later on, when I heard the testimony that he was backing that gives me a reason for why he was swinging to his starboard.

"Q. Did you tell Nolan you were backing?

"A. No, sir.

"Q. Why not?

"A. For the simple reason I could handle my tow in backing.

"Q. Don't you claim Nolan should have told you he was backing?

"A. Yes, I do.

"Q. You do?

"A. Yes, sir.

"Q. So you didn't have to tell Nolan that you were backing, but Nolan had to tell you that he was backing?

"A. In fact, I am supposed to state—when your vessel is going astern, you are supposed to say —to give three whistles. I am supposed to, as well as Captain Nolan is supposed to, and another thing—

"Q. But neither one of you did it in this case?

"A. Neither one of us did it. And my reason for not doing it is, of course, as it says here in this risks of collisions, anybody is allowed to go against them if they want to. In fact, I didn't want Captain Nolan to know I was going astern. I could handle my vessel the same going astern as I could going ahead, and if I told him I was going astern, probably the first thing he would do would be to start going astern himself. What I wanted him to do was to come ahead on the starboard helm. That is what I wanted him to do."

And again Pease testified on the same subject as follows (pp. 1294-1295):

"Q. What could Nolan have done to avoid the collision?

"A. Nolan could have blown three whistles when we were a good distance apart.

"Q. That would have avoided the collision, would it?

"A. No, but it would have given me a chance to know why he was swinging to starboard.

"Q. But you say you couldn't have executed any maneuver at that time, to have avoided the collision?

"A. No, sir.

"Q. All right. If that be the case, what difference would it have made, if Nolan blew you three whistles, or any other old number?

"A. That would have given me a chance to do something else I couldn't do otherwise.

"Q. Then if Nolan blew three whistles, you would have had a chance to do something else?

"A. I could.

"Q. Because Nolan didn't blow three whistles, you didn't have a chance to do anything else?

"A. No, sir.

"Q. Is that right?

"A. That is right.

"Q. That is your full explanation. Now, if you want to explain that, Archie, I want you to do it.

"A. Now, here. If he signaled to me when we were a good distance apart, that is, before he blew the danger signal, which I say—if the danger signal had been three whistles instead of the danger signal, it wouldn't have been time enough for me to do anything, but if he had blown three whistles when we were a reasonable distance apart, then I could not have cross signaled him, but it would have given me a reason to know he is going full speed astern and, as long as he is going full speed astern, he is going to swing to his starboard; I could arrive at it that way. I may blow a danger signal and one whistle; 'If you are backing up, it is causing you to go to starboard. Will you let me go on the other side?' And I couldn't swing and go the other side of him unless I blew the danger signal and one whistle."

Nolan's failure to blow three blasts contributed to the collision. He committed a breach of a positive statutory rule; and, under the doctrine of The Pennsylvania

and following cases, The Thode Fagelund must show, not only that his fault was not one of the causes of the collision, or probably was not, but that it could not have been the cause.

The Pennsylvania, 19 Wall. 125, 136.
The Martello v. The Willey, 14 Sup. Ct. Rep. 723, 727.
The Oregon, 27 Fed. 751, 758.

NOLAN INCOMPETENT.

Nolan appears to have broken most of the rules of navigation that night. In addition to the faults which we have pointed out, he put his helm hard astarboard and commenced to swing his vessel across the bows of the Thielbek and Ocklahama even *before* he blew the first two whistles. (Nolan, p. 859.) In another part of his testimony he changes this to say that he put his helm hard astarboard just after or about the time of the first two whistles. But this makes no difference. As the burdened vessel he had no right to attempt this maneuver until he *obtained the assent of the Thielbek and Ocklahama.* According to his testimony most favorable to himself, *he did not wait for that assent,* and according to part of his testimony he acted *before he had even asked for that assent.*

Nolan's failure to understand what was required of him is nowhere better illustrated than by his utter lack of appreciation of the fact that when he blew two whistles and asked for the starboard passage, he should have calculated where the Thielbek and Ocklahama would pass him in relation to the stern of the dredge

Chinook. He should have asked himself: "How much room will there be between me and the Chinook for the Ocklahama and Thielbek to go through?" If there was one thing he should have known it was that. According to him the stern of the dredge Chinook was the key to the whole maneuver. He asked the Ocklahama and Thielbek to go between him and the stern of the Chinook, and yet he never thought of the point where the passage would be made. He didn't know whether it would take place just as he was passing the Chinook so that the Ocklahama and her tow, with a total beam of seventy-nine feet, would have to crowd through the one hundred odd foot space which he left them, or whether it would take place below the stern of the Chinook, after the Fagelund had passed her and in a more open space. He says he relied on the tide striking his starboard bow and setting him farther away from the Chinook, and thus widening the passage through which the Thielbek and Ocklahama could pass. Yet he cannot tell even approximately what the tide was nor how far it would set him over. The truth is, Nolan, in so vital a matter as to where the passing point would be in relation to the stern of the Chinook, can tell us nothing about it. See his testimony, Nolan, pp. 868-872. Our deductions from this testimony are that while fearful of getting nearer the stern of the Chinook than one hundred odd feet himself, he was quite willing to force the Ocklahama and tow, with their combined beam of seventy-nine feet, to pass in that same one hundred odd feet. (For the beam of the Ocklahama and tow see Bergman, p. 304 and Pease, p. 1188.)

THE "THODE FAGELUND" WAS THE BURDENED VESSEL AND BOUND TO KEEP OUT OF THE WAY FOR TWO ADDITIONAL REASONS.

Steamers being more easily handled than any other kind of vessel are bound to keep out of the way of a tug encumbered with a tow. This rule is declared in the case of "The Syracuse," 9 Wall. 672, 675, and has ever since been adhered to. Indeed Spencer, in his work on Marine Collisions, goes so far as to say that a tug with a heavy tow, is to be treated with the same regard as is shown a sailing vessel, his statement being:

> "As between a steamer and a tug, with a heavy tow, the tug and tow are to be treated as a sailing vessel and the duty of avoiding them is imposed upon the steamer."
>
> Spencer on Marine Collisions, top of page 265.

The rule is also well settled that a steamer, proceeding against the current, must make way for one coming with the current. The rule is based upon the well known fact that a steamer going against the current has better steerage way and better control over her movements than one coming with the current.

> "Where, in order to avoid a collision between two vessels propelled by steam, one going with, and the other against the tide, it is conceded that one should stop, it is the duty of the vessel proceeding against the tide to do so, as her movements can be

controlled with less difficulty than those of the other vessel."

Head note to the Galatea, 92 U. S. 439.

In the case at bar the tide was flooding, and the "Ocklahama" and "Thielbek" were coming with the current and the "Thode Fagelund" was going against it. As such the "Thode Fagelund" was bound to keep out of the way of the other two.

THE PORT OF PORTLAND'S CONTENTION THAT NOLAN'S ACTS, WHILE CAUSING THE COLLISION, DO NOT CONSTITUTE NEGLIGENCE BUT WERE MERE ERRORS OF JUDGMENT.

This contention of the Port of Portland will be found on pages 39 to 50 inclusive of its brief. If we have made the foregoing part of this brief clear, Nolan's acts amount not only to negligence but to gross negligence. He was negligent when he lifted his anchor and started to sea without waiting for the Chinook to swing. He was negligent when he blew for the starboard passage, when the circumstances show that he could have made the port passage, and when he admits that he could have made the port passage if the Ocklahama had blown first. His failure was a breach of a statutory duty and he must show not only that it did not cause the collision, but that it could not have caused it. He was grossly negligent when, having been accorded the starboard passage he asked for, he reversed his engines and made that very passage impossible. Finally

he was negligent in not blowing three whistles to indicate that he was backing, and this too was a breach of statutory duty and the Thode Fagelund must show that it could not have caused the collision.

The cases cited by proctor for the Port of Portland are not in point. We cheerfully invite your Honors to inspect them. The facts will be found so different that those cases merit no consideration. The two upon which the proctor for the Port places the most reliance are Reeves, et al. vs. the Ship Constitution, Gilpin's Rep. 579, and the Grace Girdler, 7 Wall. 196.

In the Grace Girdler a schooner ran down a pleasure yacht which, in attempting to avoid a ferry-boat, unexpectedly got in the way of the schooner. The schooner had her sails slack and was *powerless* to control her movements at that moment. An independent witness, Captain Barber, who was on another schooner close by and witnessed the collision, said: "I don't see as the Grace Girdler could do anything to prevent this collision," and the court adopted this view. In the words of the court, the yacht "suddenly thrust herself before the schooner and took the latter by surprise." It is plain that the court was of the opinion that there was not even a mistake of judgment here and that the collision was unavoidable. The language quoted in italics in the Port of Portland's brief, namely—"If there was any omission, under the circumstances it was an error and not a fault. In the eye of the law the former does not rise to the grade of the latter, and is always venial"—refers not to the schooner, which was the vessel being proceeded against in the case, but to the libelant's own

boat, the yacht, and is nothing more than a dictum. We concede that it states the law correctly but it had no particular application to the case. It is noteworthy too that the Chief Justice and two of the Justices dissented.

In Reeves against the Constitution, the pilot, going along close to the dock line, saw a schooner heading in for the docks across his course. Behind the schooner, which was crossing his course, were several others, some at anchor and some under way. He was suddenly confronted with the alternative of passing in front of the schooner or going astern of her. If he passed in front, between her and the docks, it was a close call but he had a *chance* to make it and he nearly did make it. The event proved that a half minute's time either way would have enabled him to pass in front of her in safety. If he had gone astern of her he would have *certainly* come into collision with some of the other schooners which were there lying at anchor or cruising. It will therefore be seen that he adopted the best course and did not make even a mistake of judgment. That this is so is shown by the testimony of Mr. Maule. Maule was a passenger on the tug and was himself a pilot. He was standing in a position to see the whole collision. He was, therefore, the most reliable witness in the case for he was not only an independent witness but he was a pilot himself, and he said: "The ship took the straight course; that she had, or was obliged, to go inside of the schooner, and he thought there was room enough to do so without touching her, and there would have been if her jib-boom had been rigged in. He thought they

could not have gone astern *without running into more vessels* than they did; that there was no chance of going astern of her. He says, that it was the schooner's fault that she came in collision with the steamboat; if she had stopped one-half minute, we should have gone clear of her," and the court added: "And I may say the manner of the contact and injury proves this to be true."

It will be seen from this testimony that the tug had no other alternative than to do what she did and it was not even a mistake of judgment. If she had gone to the left she would have certainly run into the other schooners. Even at the time of collision, when the schooner had widened the space between herself and those astern of her, the closest one to her was only *fifty yards* and that fifty yards is the estimate of Captain Roth, a witness who was anxious to make the distance as great as possible.

Consider how different this is from Nolan's case, who, if he had kept on going on the course he had himself asked for, and had not changed his mind and reversed his engines within six seconds after asking for that course, would have had *six or seven hundred feet* of clear water to go through.

The other cases cited by proctor for The Port of Portland are so dissimilar in facts from this case that we do not deem it necessary to take space to comment on them. An examination of them, however, will show that in practically all of them there was not even a mistake of judgment, but the court says that even *if* there were, it did not constitute a fault.

The suggestion seems to be made in the Port's brief

that Nolan's acts were done in extremis, for it is said therein, on page 47, "the situation indeed when they got a full view of the Thielbek and Ocklahama was one of surprise." Now this is not true. Pilot Nolan and Captain Hansen had a full view of the Thielbek and Ocklahama from the very first. They distinctly say that they saw them clear of the dredge and that they were then *fifteen hundred feet away from them* and indeed as they have located their positions on the chart, the distance was greater. Nolan had plenty of time to select his course. He and Captain Hansen saw the Thielbek and Ocklahama "distinctly plain" (Nolan, p. 786). Captain Hansen said: "There is a tow coming up there pilot," to which Nolan answered: "I see Captain" (Hansen, p. 500). Hansen stepped back two or three paces, got his glasses, retraced his steps, and by that time Nolan had blown his first two whistles (Hansen, p. 500). These were not answered and Nolan stopped his engines (Hansen, p. 500, Nolan, p. 855), and about ten seconds after the first two whistles, blew two more which were promptly answered (Nolan, p. 859). It is obvious that his selection of this course was deliberate and not hurried. When he had selected that course it was his imperative duty to follow it, and Pease had a right to rely on his following it.

Proctor for the Port, in his effort to argue that Nolan's acts were mere errors of judgment, says that Captain Hansen, standing on the bridge by Nolan, approved his every action and gave Nolan a letter of exoneration. If we construe Captain Hansen's testimony correctly, he did not approve everything that

Nolan did. Captain Hansen knew that backing the engines was wrong and practically told Nolan so at the time. The instant the order was given he protested to Nolan in these words: "She may turn on you Pilot" (Hansen, p. 520). It is true that afterwards he gave Nolan a letter of exoneration. It is worth remembering in that connection, however, that Captain Hansen and the Thode Fagelund have got to defend Nolan in order to defend themselves against Knohr & Burchard's libel, for if Nolan was negligent the Thode Fagelund is liable.

The China, 7 Wall. 53.

There is moreover the natural human tendency of the captain to defend his own ship and his own pilot, especially when he, himself, was on the bridge with the pilot and so may be regarded as partly responsible for the handling of the ship. Furthermore Wilhelmsen's libel, as originally drawn, was all based on the theory of the Ocklahama's negligence. Obviously therefore Captain Hansen, in trying to support the case made by his libel, could not admit that his own pilot was to blame.

If the Thode Fagelund can hoist her anchor prematurely without waiting for the Chinook to swing clear, and, on sighting the other vessel more than fifteen hundred feet away on a clear night, can blow for the wrong passage, when under no stress of circumstances to do so, and, being accorded that passage, and with six or seven hundred feet of clear water ahead of her to make it in, can then immediately reverse her engines so as to make the passage impossible, and can than fail

to blow three whistles, as required by law, to indicate that she was reversing, all the while too being the burdened and not the privileged vessel—if she can do all these things, and then escape paying for the losses which her actions caused to innocent parties, on the ground suggested by proctor for the Port that everything she did was "only an error of judgment"—then certainly no libelant need ever hope to recover. We have shown clearly that there was nothing in extremis about this—that at the time Nolan reversed his engines he was nearly, if not quite, a quarter of a mile away from the other ship. But even if it had been in extremis, the Thode Fagelund by her own faulty conduct had put herself there, and can not escape the consequences of her actions while in that position.

The Elizabeth Jones, 112 U. S. 514.

THE THODE FAGELUND IS LIABLE IN REM FOR KNOHR & BURCHARD'S DAMAGES AND COSTS EVEN THOUGH SHE WAS NAVIGATED BY THE PORT OF PORTLAND'S PILOT.

It is argued in the brief of the proctor for Wilhelmsen, on pages 130 to 132, that, conceding Pilot Nolan was negligent, Knohr & Burchard, Nfl. should not have a decree against the Thode Fagelund *in rem,* but should be restricted to a decree against the Port of Portland *in personam,* since Nolan was the Port of Portland's servant and, to quote the proctor, "the rule of *respondeat superior* as to Wilhelmsen is not satsified because Nolan was not an employee of Wilhelmsen."

The law, however, has long been settled contrary to the proctor's contention by the case of The China, 7 Wall. 53. In that case the Supreme Court of the United States held a vessel liable for a collision, though she was being navigated by a pilot whom she had been *compelled* by a compulsory state pilotage law to take on board. There is no compulsory pilotage law in Oregon and the Thode Fagelund was not obliged to take Pilot Nolan on board. In The China the court pointed out that the law of *respondeat superior* has no application; for the responsibility of a vessel for torts committed by it is not derived from the law of Master & Servant or from the Common Law at all, but from the Maritime Law, which impresses a maritime lien upon the vessel, in whosesoever hands it might be, for torts committed by it. In other words, the vessel is the offending thing. In this particular case it would work a great hardship on Knohr & Burchard, Nfl. to compel them to look to the Port of Portland alone for compensation. The Port of Portland is contesting liability on the grounds that its acts were *ultra vires,* and plainly states in its brief that its tax levying power may not be sufficient to enable it to raise the sums necessary to pay these damages; and it is well known that none of its physical property can be seized, but that the only remedy of a judgment creditor of the Port would be to mandamus the Commissioners to levy taxes to pay the judgment. Contrasted with these difficulties, Knohr & Burchard, Nfl. are proceeding against the Thode Fagelund *in rem* and have secured the usual admiralty stipulation to abide the decree and pay any damages which may

be awarded. They rely on this stipulation and insist on the doctrine of the China being applied here for their benefit.

A FEW COMMENTS ON WILHELMSEN'S BRIEF.

Most of the foregoing brief was written before the writer had had an opportunity to read the brief of proctor for Wilhelm Wilhelmsen. A few things therefore require brief notice. It is suggested therein, on pages 38 and 136, that the court disregarded the theories of all the proctors in the case, and formed a theory of its own on which it held the Thode Fagelund and Pilot Nolan negligent. We must take exception to this, for we have some pride in the fact that the court adopted our own theory of the collision. The court held Nolan negligent for reversing his engines and going to starboard, especially when he did not signal that fact with three whistles. This was exactly what we alleged against the Thode Fagelund, the allegations in Knohr & Burchard's libel being found on page 159 of the Apostles and being as follows: "and was negligent in blowing two (2) whistles and attempting to cross the bow of the "Ocklahama" and tow when the red light of the "Ocklahama" was showing to the "Thode Fagelund," and the green light of the "Thode Fagelund" was showing to the "Ocklahama," thus indicating that the vessels were approaching diagonally and that the "Thode Fagelund" had the "Ocklahama" and tow on her starboard hand; but, when that course had been agreed upon by the exchange of signals aforesaid, the "Thode Fagelund" was

grossly negligent in altering her course more and more to her own starboard to such an extent that she crowded the "Ocklahama" and "Thielbek" so close to the "Chinook" as to make a collision between these vessels and the "Chinook" imminent, and to such an extent that she received the blow of the "Thielbek" on her port bow. That libelants are informed and therefore say that the "Thode Fagelund" reversed her engines full speed astern shortly before the collision; that if this is true the "Thode Fagelund" was negligent in that she did not blow three whistles to indicate that she was thus backing, as required by the rules of navigation."

It is sometimes suggested in Wilhelmsen's brief that the collision was a head-on collision, and, roughly speaking, it was so. It was hardly so, however, to the extent indicated by the following language on page 118 of the brief: "The rent in the Fagelund's bow, and the turning of her stem to starboard show that the vessels came together so nearly head-on that another foot would have put the Thielbek to the starboard or right side of the Thode's stem." The fact appears to be that the Thielbek struck the Thode Fagelund on the latter's port bow at an angle of five or six degrees. This is the testimony of the chief officer J. A. Hansen, who was on the Thode Fagelund's bow at the time (J. A. Hansen, pp. 599 and 629). See also the various diagrams (pp. 1419, 1424, 1425).

It is suggested on pages 111 and 112 of the brief that Pilot Pease, of the Ocklahama, instead of persisting in his course toward the stern of the Chinook, should

have changed the whole maneuver that had been agreed on, and should have passed through the seven hundred feet of clear water between the Chinook and the Astoria docks, passing the Thode Fagelund on his port side. In other words, that after he saw that the Thode Fagelund was not carrying out the starboard passage she had asked for, he should have cancelled the agreement and tried to make a port to port passage. This we do not think is fair to Pease. Nolan had asked for the starboard passage and had been given it, and Pease had every right to expect that he would carry it out; if Pease had cancelled the agreement and tried to make a port passage and disaster had resulted, nobody would have been to blame but Pease. This theory of proctor's as to what Pease should have done suggests the following language from the opinion in the "George L. Garlick," 91 Fed. 920, 926:

> "After a marine accident, the offending navigators are quite ready with the accusation, against the unoffending ship, that their mistake or fault was appreciable and that the opposite ship should have guarded against it by departing from the prescribed rule of navigation. When one vessel has dictated the maneuver, and the other vessel has adopted and done her part to execute it, the facts should be clear, before the court should hold that the maneuver should have been interrupted, in the course of its fulfillment, because the vessel that initiated the movement failed to do her part. When a vessel is doing right, it is not always easy to determine nicely when the opposite vessel is doing

wrong and whether she will in time correct her error, and at just what time the unoffending vessel should undertake to counteract the wrong."

The testimony of Mr. Eggars, the chief officer of the Thielbek, is quoted at some length in Wilhelmsen's brief to show the positions of the vessels at first sight. Eggars drew a diagram showing these positions which has not been incorporated in the printed record, and, believing that that diagram might be helpful to your Honors in connection with his testimony, we have, in accordance with Rule 14 of the rules of this court, procured an order from the District Court, that the original diagram be sent up to this court for your Honor's inspection.

THE THODE FAGELUND'S FAULT BEING OBVIOUS, THE EVIDENCE TO ESTABLISH FAULT ON THE PART OF THE OCKLAHAMA MUST BE CLEAR AND CONVINCING.

The City of New York, 147 U. S. 72, 85, 13 Sup. Ct. 211.

The Ludwig Holberg, 157 U. S. 60, 71, 15 Sup. Ct. 477.

The Umbria, 166 U. S. 404, 409, 17 Sup. Ct. 610.

The Victory, 18 Sup. Ct. Rep. 149, 155.

THE THIELBEK DID NOT PARTICIPATE IN THE NAVIGATION AND HOWEVER THIS CASE GOES, CANNOT BE HELD IN FAULT.

Indeed any attempt to hold the Thielbek at fault has, we believe, been abandoned. The cases settling her immunity are:

Sturgis vs. Boyer, 24 Howard, 110.
The Eugene F. Moran, 29 Sup. Ct. Rep. 339.
The John Fraser, 21 Howard, 184.
The Doris Eckhof, 50 Fed. 134.
Spencer on Marine Collisions, Sec. 122.

Respectfully submitted,

ERSKINE WOOD,

Proctor for Knohr & Burchard, Nfl.